

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY D. HENDERSON and U.S. POSTAL SERVICE,
MORGAN STATION GENERAL MAIL FACILITY, New York, NY

*Docket No. 00-648; Submitted on the Record;
Issued March 12, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs, by its decision dated September 18, 1999, abused its discretion in denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On August 26, 1994 appellant, then a 34-year-old mail processor, sustained a temporary aggravation of cervical spondylosis. She did not stop work. On November 10, 1994 appellant accepted a limited-duty job offer restricting her from heavy lifting, pushing and pulling.

On August 13, 1996 appellant filed a recurrence of disability claim alleging that on August 12, 1996 she sustained a recurrence of her August 26, 1994 employment injury.¹ On the claim form, she alleged that she sustained the "same muscle sprain on upper and lower back, and muscle spasms." Appellant stopped work on August 12, 1996.

By letter dated October 25, 1996, the Office advised appellant of the type of evidence necessary to support her claim and it requested additional factual and medical evidence.

By decision dated September 30, 1997, the Office denied appellant's claim on the grounds that the evidence of record failed to show that she sustained a recurrence on August 12, 1996 causally related to her August 26, 1994 employment injury.

By letter dated October 27, 1997, appellant requested a review of the written record by an Office hearing representative.

¹ The record shows that appellant also filed recurrence of disability claims on November 21, 1994, January 10, 1995 and June 12, 1996 alleging that, on November 23 or 24, 1994, she sustained a recurrence of disability causally related to her August 26, 1994 employment injury. By letter dated January 24, 1995, the Office acknowledged appellant's recurrence claims and requested additional information but it does not appear that the Office further adjudicated those claims.

By decision dated March 6, 1998, the Office hearing representative affirmed the Office's September 30, 1997 decision denying appellant's recurrence claim. The hearing representative found that appellant failed to satisfy her burden of proof to establish that she sustained a recurrence of disability on August 12, 1996 causally related to her August 26, 1994 employment injury.

By letter dated April 7, 1998, appellant requested reconsideration of the Office hearing representative's March 6, 1998 decision.

By decision dated July 31, 1998, the Office denied appellant's April 7, 1998 reconsideration request on the grounds that the evidence of record was insufficient to warrant modification of its prior decision. The Office found that, based upon statements provided by appellant, her coworker and the employing establishment, appellant did not show that she was working outside of her limited-duty restrictions at the time of her alleged August 12, 1996 recurrence of disability.

By letter dated July 3, 1999, appellant again requested reconsideration. In her letter, appellant alleged that her disability was caused by her inability to continue treatments with Dr. Tsai Chao, Board-certified in physical medicine and rehabilitation, due to the Office's denial of her claim. She also alleged that the employing establishment requested light- or limited-duty employees to relieve other employees taking 15-minute coffee breaks and 30-minute lunch breaks. Appellant further alleged that the required work was outside of her restrictions because she lifted trays weighing approximately 20 pounds, placed them into a 6-foot tall "greybird," and repeatedly walked along an approximately 40-foot long machine to remove mail or place mail into the machine. She stated that her shop steward advised her to accept such requests prior to receiving a physician's note. Appellant alleged that during that period of time she experienced severe pain and spasms.

To support her reconsideration request, appellant submitted a July 1, 1999 report in which Dr. Chao stated that he first treated appellant on August 12, 1994 for recurrent neck and lower back pain. Dr. Chao also stated that he last examined appellant on February 5, 1999 at which time she was experiencing persistent neck and back pain "which remain unchanged." He diagnosed the following conditions: (1) chronic neck pain secondary to cervical spondylosis; (2) chronic cervical and upper trapezius muscle strain; (3) myofascial pain syndrome; (4) cervical radiculopathy; (5) chronic lower back pain secondary to lumbar spine spondylosis; (6) chronic lumbar muscular strain and myofascial pain syndrome; (7) lumbar radiculopathy; (8) thoracic spine muscular strain; (9) bilateral knee arthritis; and (10) rule out autoimmune disease. Dr. Chao opined that appellant was permanently totally disabled.

Appellant also submitted an April 1, 1999 report in which Dr. Arooj Shaikh, a Board-certified diagnostic radiologist, diagnosed a slight reversal of normally expected cervical lordotic curvature possibly related to muscular spasm or positioning. Dr. Shaikh noted no evidence of fracture, dislocation or prevertebral soft tissue swelling.

Appellant further submitted nerve conduction study notes dated May 13 and 6, 1999 from a physician whose signature is illegible. The May 5, 1999 study contained findings within normal limits and noted neurogenic dysfunction consistent with right C5-7 radiculopathy. The

May 13, 1999 study contained findings within normal limits and noted right L5-S1 radiculopathy.

Additionally, appellant submitted progress notes from physicians whose signatures are illegible dated March 31 to May 6, 1999 noting her symptoms, treatment and the physician's examination findings.

By decision dated September 18, 1999, the Office denied appellant's reconsideration request on the grounds that the evidence submitted to support her request was irrelevant and immaterial and, therefore, insufficient to warrant further merit review.

The Board finds that the Office, by its decision dated September 18, 1999, did not abuse its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).²

In order to warrant a grant of a claimant's reconsideration request, the claimant must set forth arguments and contain evidence that either shows that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, constitutes relevant and pertinent new evidence not previously considered by the Office.³ Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a case for further merit review.⁴ Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵ The submission of evidence or argument which repeats or duplicates evidence or argument already considered by the Office does not constitute a basis for reopening a case for further review on the merits.⁶

In its September 18, 1999 decision, the Office properly found that the evidence submitted to support appellant's request for reconsideration failed to address the threshold issue of whether her alleged recurrence of disability commencing August 12, 1996 was causally related to her August 26, 1994 employment injury and, therefore, was irrelevant and insufficient to warrant further merit review.

In his July 1, 1999 report, Dr. Chao stated appellant's diagnoses and opined that she was permanently totally disabled but he failed to address the causal relationship issue. Similarly, Dr. Sahaikh's April 1, 1999 report and the notes dated March 31 to May 13, 1999 contained

² The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Martha L. Street*, 48 ECAB 641, 644 (1997). As appellant filed her appeal with the Board on October 25, 1999, the sole decision before the Board is the Office's September 18, 1999 decision.

³ *Alton L. Vann*, 48 ECAB 259, 269 (1996); 20 C.F.R. § 10.606(b)(2).

⁴ *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

⁵ 20 C.F.R. § 10.608(b) (1999).

⁶ *David E. Newman*, 48 ECAB 305, 308 (1997); see *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

diagnoses but did not discuss the issue of whether appellant's alleged recurrence of disability was causally related to her August 26, 1994 employment injury.

Appellant's narrative statement did not contain new or relevant evidence showing that the Office erroneously applied or interpreted a specific point of law nor did it advance a relevant legal argument not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated September 18, 1999 is affirmed.

Dated, Washington, DC
March 12, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member